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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

42

**RALPH GINZBURG, DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC. and LIAISON NEWS
LETTER, INC.,**

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

**BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL,
INC., AS AMICUS CURIAE IN SUPPORT OF PETITION
FOR REHEARING**

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Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc., of 1 Park Avenue, New York City, is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 190 members of the Council publish and distribute approximately 90% of all general books. None of the petitioners is a member of the Council.

Because of the Council's interest in safeguarding freedom of the press guaranteed by the First and Fourteenth Amendments of the Constitution, it took steps to and did file an *amicus curiae* brief herein, urging that this Court apply a three-fold test to determine obscenity:

1. That the work must appeal to prurient interest;
2. That the work must be patently offensive; and
3. That the work must be utterly without any redeeming social importance.

The decision of this Court in this case and in *A Book Named "John Cleland's Memoirs" v. Massachusetts*, decided the same day, specifically adopted such a test. But this Court, in the instant case, went further. It also held that the circumstances of a book's promotion, sale and publicity will be examined in determining whether or not the book meets these three criteria, and that those circumstances alone may make a book obscene, even though the book, by itself, is non-obscene.

This brief is being submitted by the Council in order to obtain a reconsideration of the Court's decision to consider circumstances of advertising, promotion and sale as a factor in determining a work's obscenity. The Council believes that the addition of this factor defeats the salutary effects of the adoption of the three-fold criteria. As we stated in our original brief herein, the Council takes no position as to the obscenity or non-obscenity of any publication and, accordingly, it takes no position with respect to the obscenity or non-obscenity of the publications herein involved.

ARGUMENT

The inclusion of the circumstances of advertising, promotion and sale in adjudications as to obscenity unduly restrains the dissemination of constitutionally protected literature.

The opinion of this Court herein states that publications, the contents of which are non-obscene, may, nevertheless, be adjudicated to be obscene if the circumstances of their advertising, selling or promotion are of a pandering nature. Thus, "the deliberate representation" of a work "as erotically arousing" (1) is evidence that the work appeals to prurient interest, (2) "heightens the offensiveness * * * to those who are offended by such material" and (3) may establish that any claim of redeeming social importance is "a spurious claim for litigation purposes" (Op. p. 7). In other words, a pandering advertisement of an otherwise non-obscene book is enough to establish that all three prerequisites for obscenity have been met, thereby vitiating the three-fold test. A book is no longer considered as a whole and judged solely on its own merits; rather, a small portion of a book dealing with sex may be considered along with the advertising of a pandering bookseller as the basis of holding such book obscene.

We submit that consideration of the circumstances of advertising, promotion and sale is particularly irrelevant in determining whether a work has redeeming social importance. The social importance of a work does not turn on the intent of or the characterization given it by its distributor. Nor does it depend on offensiveness to the public; on the contrary, a work which offends the

public may nevertheless be circulated if it has social value. And the inherent social value of a work can in no way be eroded by pandering advertisements. True, the reputation of a work might be sullied by unsavory promotional devices, but its actual social value comes only from within the work itself.

An approach to obscenity which would consider the circumstances of advertising has previously been condemned in the opinion of Mr. Justice Harlan, joined in by Mr. Justice Stewart, delivering the judgment of this Court in *Manual Enterprises v. Day*, 370 U. S. 478, 491 (1962):

“ * * * And, neither with respect to the advertisements nor the magazines themselves, do we understand the Government to suggest that the ‘advertising’ provisions of § 1461 are violated if the mailed material merely ‘gives the leer that promises the customer some obscene pictures.’ *United States v. Hornick* (CA 3 Pa) 229 F 2d 120, 121. Such an approach to the statute could not withstand the underlying precepts of Roth. See *Poss v. Christenberry* (DC NY) 179 F Supp 411, 415; cf. *United States v. Schillaci* (DC NY) 166 F Supp 303, 306.”

By considering advertisements as a key to whether the obscenity criteria have been met, the Court has placed publishers in an extremely precarious position. Since a socially valuable book may be held to be obscene as a result of an advertisement for it, the publisher may no longer rely upon an evaluation of that book's contents to determine whether such book is obscene. As a result of the Court's decision herein, he will refuse to publish many socially valuable books even though his evaluation is that the contents of such books do not render them obscene.

For, as a result of the new conditions for testing obscenity announced by the Court in this case, one bookseller over whom the publisher has no control may convert the publisher's investment in a literary work into a financial disaster by inserting a pandering advertisement. Once a book is adjudged obscene in *one* context (and we can be certain that henceforth most prosecutions and judgments dealing with obscenity will lean on advertising), booksellers will be afraid to sell the book in *any* context and the publisher will be saddled with an economic loss against which he cannot protect himself, occasioned by the sins of another. This threat of economic loss must induce self-censorship and restraint of book dissemination far beyond the careful limits of the three-fold test, and "thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly * * * [and] the distribution of all books, both obscene and not obscene, would be impeded." *Smith v. California*, 361 U. S. 147, 154 (1959). Since the decision of this Court on March 21, 1966, members of the Council have received instructions from important customers to cancel shipments of books not believed by the publishers to be obscene because of possible criminal liabilities which promotion of these books may impose on the seller.

The publisher's difficulty is compounded by the unanswered question of what is a pandering advertisement. To illustrate the difficulties posed by this question: is the following, a typical advertisement which appeared as the main material of an approximately quarter-page advertisement in "The New York Times" of April 8, 1966 for

the motion picture "DEAR JOHN," a work which received wide critical acclaim, a pandering advertisement?

"ACADEMY AWARD NOMINEE:

BEST FOREIGN FILMS OF THE YEAR

'A frank and uninhibited exposition of the onrush of physical desire. It is a stunning picture!—Bosley Crowther, N. Y. Times.

* * * * *

'A tender and lusty study of love. A tour de force of erotic realism! Lovemaking banter . . . as explicit as the law allows!—Time Magazine.

'Astonishingly frank! An unabashed look at real-life-sex. Remarkably uninhibited in its recording of the way lovers talk and touch and think!—Richard Schickel, Life Magazine.

* * * * *

DEAR JOHN

* * * * *

LOEW'S

TOWERS EAST

72nd St. & 3rd Ave."

If this is a pandering advertisement, this motion picture could be adjudicated to be obscene despite the value numerous critics found in it.

A pandering advertisement for a particular book may be ground for subjecting the persons responsible for the advertisement to criminal sanctions. However, such advertising should play no part in determining the obscenity of that book. Otherwise, the dissemination of socially valuable works would be restricted either directly by governmental action or indirectly by prudent publishers fearing to have the merits of their books adversely

adjudicated because of advertising conceived long after the book has been published and over which they have no control. This type of restriction caused this Court to strike down as unconstitutional the ordinance involved in *Smith v. California*, 361 U. S. 147 (1959).

We urge that all adjudications with respect to obscenity be predicated solely upon the contents of the material involved.

Respectfully submitted,

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